

AMENDED IN SENATE MARCH 18, 2015

SENATE BILL

No. 176

Introduced by Senator *Senators Mitchell and Anderson*

(*Coauthors: Senators Hall and Hertzberg*)

**(*Coauthors: Assembly Members Chu, Gonzalez, Lackey, Maienschein,
McCarty, and Waldron*)**

February 9, 2015

An act to amend Section 1347 of the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

SB 176, as amended, Mitchell. Examining children as witnesses.

Existing law authorizes a court in a criminal proceeding, upon written notice by the prosecutor made at least 3 days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled or during the course of the proceeding on the court's own motion, to order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes specified findings. One of the findings existing law requires is that the minor's testimony will involve a recitation of the facts of specified crimes, including an alleged violent felony of which the minor is a victim. ~~Under existing law, in making the determination as to whether to authorize contemporary examination and cross-examination of the minor, the court is required to consider the age of the minor, the relationship between the minor and the defendant, any handicap or disability of the minor, and the nature of the acts charged.~~

This bill would authorize a minor 13 years of age or younger to testify by contemporaneous examination and cross-examination if the testimony will involve the recitation of the facts of an alleged violent felony, whether or not the minor is a victim. ~~The bill would also require the court, in making the determination to authorize contemporaneous examination or cross-examination, to consider the wishes of the parent or guardian of the minor.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1347 of the Penal Code is amended to
2 read:

3 1347. (a) It is the intent of the Legislature in enacting this
4 section to provide the court with discretion to employ alternative
5 court procedures to protect the rights of a child witness, the rights
6 of the defendant, and the integrity of the judicial process. In
7 exercising its discretion, the court necessarily will be required to
8 balance the rights of the defendant or defendants against the need
9 to protect a child witness and to preserve the integrity of the court's
10 truthfinding function. This discretion is intended to be used
11 selectively when the facts and circumstances in the individual case
12 present compelling evidence of the need to use these alternative
13 procedures.

14 (b) Notwithstanding any other law, the court in a criminal
15 proceeding, upon written notice by the prosecutor made at least
16 three days prior to the date of the preliminary hearing or trial date
17 on which the testimony of the minor is scheduled, or during the
18 course of the proceeding on the court's own motion, may order
19 that the testimony of a minor 13 years of age or younger at the
20 time of the motion be taken by contemporaneous examination and
21 cross-examination in another place and out of the presence of the
22 judge, jury, defendant or defendants, and attorneys, and
23 communicated to the courtroom by means of closed-circuit
24 television, if the court makes all of the following findings:

25 (1) The minor's testimony will involve a recitation of the facts
26 of any of the following:

27 (A) An alleged sexual offense committed on or with the minor.

1 (B) An alleged violent felony, as defined in subdivision (c) of
2 Section 667.5.

3 (C) An alleged felony offense specified in Section 273a or 273d
4 of which the minor is a victim.

5 (2) The impact on the minor of one or more of the factors
6 enumerated in subparagraphs (A) to (E), inclusive, is shown by
7 clear and convincing evidence to be so substantial as to make the
8 minor unavailable as a witness unless closed-circuit testimony is
9 used.

10 (A) Testimony by the minor in the presence of the defendant
11 would result in the child suffering serious emotional distress so
12 that the child would be unavailable as a witness.

13 (B) The defendant used a deadly weapon in the commission of
14 the offense.

15 (C) The defendant threatened serious bodily injury to the child
16 or the child's family, threatened incarceration or deportation of
17 the child or a member of the child's family, threatened removal
18 of the child from the child's family, or threatened the dissolution
19 of the child's family in order to prevent or dissuade the minor from
20 attending or giving testimony at any trial or court proceeding, or
21 to prevent the minor from reporting the alleged sexual offense, or
22 from assisting in criminal prosecution.

23 (D) The defendant inflicted great bodily injury upon the child
24 in the commission of the offense.

25 (E) The defendant or his or her counsel behaved during the
26 hearing or trial in a way that caused the minor to be unable to
27 continue his or her testimony.

28 In making the determination required by this section, the court
29 shall consider the age of the minor, the relationship between the
30 minor and the defendant or defendants, any handicap or disability
31 of the minor, ~~and the nature of the acts charged, and the wishes of~~
32 ~~the parent or guardian of the minor. charged.~~ The minor's refusal
33 to testify shall not alone constitute sufficient evidence that the
34 special procedure described in this section is necessary to obtain
35 the minor's testimony.

36 (3) The equipment available for use of closed-circuit television
37 would accurately communicate the image and demeanor of the
38 minor to the judge, jury, defendant or defendants, and attorneys.

39 (c) If the court orders the use of closed-circuit television,
40 two-way closed-circuit television shall be used, except that if the

1 impact on the minor of one or more of the factors enumerated in
2 subparagraphs (A) to (E), inclusive, of paragraph (2) of subdivision
3 (b), is shown by clear and convincing evidence to be so substantial
4 as to make the minor unavailable as a witness even if two-way
5 closed-circuit television is used, one-way closed-circuit television
6 may be used. The prosecution shall give the defendant or
7 defendants at least 30 days' written notice of the prosecution's
8 intent to seek the use of one-way closed-circuit television, unless
9 good cause is shown to the court why this 30-day notice
10 requirement should not apply.

11 (d) (1) The hearing on a motion brought pursuant to this section
12 shall be conducted out of the presence of the jury.

13 (2) Notwithstanding Section 804 of the Evidence Code or any
14 other law, the court, in determining the merits of the motion, shall
15 not compel the minor to testify at the hearing, nor shall the court
16 deny the motion on the ground that the minor has not testified.

17 (3) In determining whether the impact on an individual child of
18 one or more of the five factors enumerated in paragraph (2) of
19 subdivision (b) is so substantial that the minor is unavailable as a
20 witness unless two-way or one-way closed-circuit television is
21 used, the court may question the minor in chambers, or at some
22 other comfortable place other than the courtroom, on the record
23 for a reasonable period of time with the support person, the
24 prosecutor, and defense counsel present. The defendant or
25 defendants shall not be present. The court shall conduct the
26 questioning of the minor and shall not permit the prosecutor or
27 defense counsel to examine the minor. The prosecutor and defense
28 counsel shall be permitted to submit proposed questions to the
29 court prior to the session in chambers. Defense counsel shall be
30 afforded a reasonable opportunity to consult with the defendant
31 or defendants prior to the conclusion of the session in chambers.

32 (e) When the court orders the testimony of a minor to be taken
33 in another place outside of the courtroom, the court shall do all of
34 the following:

35 (1) Make a brief statement on the record, outside of the presence
36 of the jury, of the reasons in support of its order. While the
37 statement need not include traditional findings of fact, the reasons
38 shall be set forth with sufficient specificity to permit meaningful
39 review and to demonstrate that discretion was exercised in a
40 careful, reasonable, and equitable manner.

1 (2) Instruct the members of the jury that they are to draw no
2 inferences from the use of closed-circuit television as a means of
3 facilitating the testimony of the minor.

4 (3) Instruct respective counsel, outside of the presence of the
5 jury, that they are to make no comment during the course of the
6 trial on the use of closed-circuit television procedures.

7 (4) Instruct the support witness, outside of the presence of the
8 jury, that he or she is not to coach, cue, or in any way influence
9 or attempt to influence the testimony of the minor.

10 (5) Order that a complete record of the examination of the minor,
11 including the images and voices of all persons who in any way
12 participate in the examination, be made and preserved as a video
13 recording in addition to being stenographically recorded. The video
14 recording shall be transmitted to the clerk of the court in which
15 the action is pending and shall be made available for viewing to
16 the prosecuting attorney, the defendant or defendants, and his or
17 her attorney during ordinary business hours. The video recording
18 shall be destroyed after five years have elapsed from the date of
19 entry of judgment. If an appeal is filed, the video recording shall
20 not be destroyed until a final judgment on appeal has been ordered.
21 A video recording that is taken pursuant to this section is subject
22 to a protective order of the court for the purpose of protecting the
23 privacy of the witness. This subdivision does not affect the
24 provisions of subdivision (b) of Section 868.7.

25 (f) When the court orders the testimony of a minor to be taken
26 in another place outside the courtroom, only the minor, a support
27 person designated pursuant to Section 868.5, a nonuniformed
28 bailiff, any technicians necessary to operate the closed-circuit
29 equipment, and, after consultation with the prosecution and the
30 defense, a representative appointed by the court, shall be physically
31 present for the testimony. A video recording device shall record
32 the image of the minor and his or her testimony, and a separate
33 video recording device shall record the image of the support person.

34 (g) When the court orders the testimony of a minor to be taken
35 in another place outside the courtroom, the minor shall be brought
36 into the judge's chambers prior to the taking of his or her testimony
37 to meet for a reasonable period of time with the judge, the
38 prosecutor, and defense counsel. A support person for the minor
39 shall also be present. This meeting shall be for the purpose of
40 explaining the court process to the child and to allow the attorneys

1 an opportunity to establish rapport with the child to facilitate later
2 questioning by closed-circuit television. No participant shall discuss
3 the defendant or defendants or any of the facts of the case with the
4 minor during this meeting.

5 (h) When the court orders the testimony of a minor to be taken
6 in another place outside the courtroom, nothing in this section
7 prohibits the court from ordering the minor to be brought into the
8 courtroom for a limited purpose, including the identification of
9 the defendant or defendants as the court deems necessary.

10 (i) The examination shall be under oath, and the defendant or
11 defendants shall be able to see and hear the minor witness, and if
12 two-way closed-circuit television is used, the defendant's image
13 shall be transmitted live to the witness.

14 (j) Nothing in this section affects the disqualification of
15 witnesses pursuant to Section 701 of the Evidence Code.

16 (k) The cost of examination by contemporaneous closed-circuit
17 television ordered pursuant to this section shall be borne by the
18 court out of its existing budget.

19 (l) Nothing in this section shall be construed to prohibit a
20 defendant from being represented by counsel during any
21 closed-circuit testimony.